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SUPREME COURT, U.S.
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No. 92-1836

In The

Supreme Court of the United States

October Term, 1992

JAMES PREE,

Petitioner,

v.

THE BRUNSWICK CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit properly held that petitioner's action was barred by either of its alternative applications of Missouri product liability law.

2. Whether there is a conflict among the United States Circuit Courts of Appeals regarding the deference to be accorded considered dicta of a state's highest court in a diversity action.

PARTIES

The petitioner (plaintiff and appellant below) is James Pree.

The respondent (defendant and appellee below) is Brunswick Corporation. Brunswick has no parent corporations but has the following subsidiaries, excluding wholly-owned subsidiaries: Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brunswick Corporation submits this brief in opposition to petitioner's request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Eighth Circuit entered judgment against petitioner on January 7, 1993. Pet. App. A; *Pree v. Brunswick Corp.*, 983 F.2d 863

(8th Cir. 1993). On February 12, 1993, the petition for rehearing was denied by unpublished order. Pet. App. B.

On September 25, 1991, the Honorable Frederick Buckles, Magistrate Judge, entered judgement in favor of respondent on a jury verdict in its favor.[1]

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against petitioner on January 7, 1993. Pet. App. A. On February 12, 1993, the Eighth Circuit denied a timely petition for rehearing. Pet. App. B.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No federal constitutional or statutory provision is involved in this case.

STATEMENT OF THE CASE

Petitioner James Pree was injured at approximately midnight on July 5, 1985 when he fell into the water next

[1] The parties consented, pursuant to 28 U.S.C. § 636(c), to allow the magistrate judge to conduct all proceedings, including trial and entry of judgment.

to the rotating propeller of a boat that was being backed into a boat slip during a storm. The motor was designed and manufactured by a division of Respondent Brunswick Corporation. Boats of this sort are known as "planing" pleasure crafts, because as they increase in speed, they rise partly out of the water and plane on the surface. Pet. App. A at ii n.2; *Pree*, 983 F.2d at 864 n.2 (citing *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1506 n.1 (11th Cir. 1990), *cert. denied*, 111 U.S. 756 (1991)).

Petitioner claimed that respondent violated Missouri tort law by not including a so-called "propeller guard" in the motor's design. The "propeller guard" would consist of a structure that in some fashion would surround the propeller. Evidence at trial showed that, despite substantial efforts by respondent and others over many years to design such a device, no propeller guard suitable for use on planing pleasure craft had been developed, and that proposed guards are actually unsafe for use by the boating public.

Thus, witnesses for both sides testified that *no* boat manufacturer, boat motor manufacturer, or boating accessory manufacturer has ever been able to offer a propeller guard for planing pleasure boats for the purpose of protecting human beings from propeller contact. *See, e.g.*, R. IV 29-32, 62-63, 99, 107; V 114; VI 197. Use of such propeller guards is virtually unheard of anywhere in the world, except in a few special applications that are wholly unlike recreational planing boats.[2]

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[2] Propeller guards are used in some parts of California, as well as in New Zealand and Australia, for life rescue operations

Indeed, Robert Swint, a systems engineer and one of petitioner's expert witnesses, acknowledged that a prototype he designed repeatedly broke after short term testing (R. IV 44-48, 56-59, 97-99), and estimated that it would take more research and testing (several generations of test products) to design, manufacture and market a safe and feasible propeller guard. R. IV 29-32, 62-63, 99, 107. He also acknowledged that every propeller guard currently proposed needed further technical development before it would be ready for use on planing pleasure craft. R. IV 84-90, 107.

Furthermore, the United States Coast Guard, which is charged with exclusive responsibility for establishment of boating safety regulations (*see* 46 U.S.C. § 4301 *et seq.*) has rejected any requirement for propeller guards on planing boats after extensively studying the question. R. VI 120-124. Moreover, propeller guards are not required by any state and are not required by the safety standards promulgated by responsible and authoritative boat safety organizations such as the American Boat and Yacht Counsel and the Society of Automotive Engineers.

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conducted in high surf; at one time they were also used on certain United States Marine Corps landing craft operated in high surf. R. V 70-75. It is expected that life rescue boats or military landing craft would be stationary or moving at very slow speeds, as contrasted with planing pleasure craft operated frequently at high speeds. It is also expected that, in both circumstances, floundering human beings would be in the water near the turning propeller. Propeller guards are used as well on small, slow-moving passenger boats in amusement parks. R. VI 124, Ex. I.

Finally, both parties' experts described numerous hydrodynamic, biomechanical and other dangers presented by propeller guards. These included:

- Substantial loss of power and speed due to added drag. R. IV 44-49, 89-91; V 67-74

- Safety hazards due to consumers' likely removal of guards to gain power and improve fuel economy thereby creating handling difficulties and causing the boat to exceed its power ratings. R. IV 99-100, 103; V 57, 67-68.

- Handling and steering problems because a guard would add new rudder area in entirely new planes creating additional steering torque. R. V 68-69.

- Dangers associated with guards breaking during use either directly or through sudden steering difficulties. R. VI 178.

- Increased danger of striking an individual in the water with the additional surface area created by the guard. R. V 57-58.

- Greater likelihood of severe injuries resulting from a "guard strike," which causes smashing and tearing injuries that are more difficult to repair than lacerations normally caused by a propeller strike. R. V 57, 67-68; VI 121, 203; VII 19, 25.

- Possible entrapment in the guard resulting in mutilation, amputation or drowning. R. V 57, 67-68; VI 121.

Despite the overwhelming evidence that safe propeller guards for planing pleasure craft simply did not exist when this motor was built (and do not exist today), the District Court allowed the case to go to the jury, which returned a verdict for respondent. The Eighth Circuit unanimously affirmed. Pet. App. A.

SUMMARY OF THE ARGUMENT

The petition for certiorari in this case should be denied because it flagrantly disregards the longstanding principle that "[t]he [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Petitioner has not shown that any of the criteria for granting certiorari review have been met. Petitioner does not suggest that the Eighth Circuit committed any error of federal law. *See* S.Ct. R. 10. The decision below was a routine instance of a court of appeals exercising its diversity jurisdiction. The Eighth Circuit explicitly applied two separate principles of Missouri substantive law in concluding that "the evidence was insufficient to show that [respondent's] engines were unreasonably dangerous." Pet. App. A at xv, xix; *Pree*, 983 F.2d at 867, 868.

Petitioner attempts to disguise the routine aspect of this case by contorting the Eighth Circuit's decision in order to contrive a conflict between the Eighth Circuit opinion and the decisions of other United States Courts of Appeals. No such conflict, however, exists. Contrary to petitioner's assertions, the Eighth Circuit, when sitting in

diversity, has recognized the persuasive influence of considered dicta by state courts. In the instant case, the Eighth Circuit did not ignore considered dicta of the Missouri Supreme Court, but properly applied two separate and independent theories of Missouri product liability law to affirm the district court's entry of judgment for respondent.

ARGUMENT

I. PETITIONER DOES NOT CONTEND THAT THE COURT OF APPEALS COMMITTED ANY ERROR OF FEDERAL LAW.

Petitioner does not contend that the Court of Appeals committed any error of federal law, or "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S.Ct. R. 10.1.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the dispositive questions in this case are entirely ones of state law. Petitioner does not contend that the Eighth Circuit failed to abide by its obligation under *Erie* to follow decisions of the Missouri courts. Pet. 7. Instead, petitioner asserts that in applying the "consumer expectation" test, the Eighth Circuit failed to follow dicta from a decision of the Missouri Supreme Court commenting that the "consumer expectation" test had not been incorporated "into the lexicon of [Missouri] products liability law." *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 376-78 (Mo. 1986).

As will be explained below, the Eighth Circuit properly applied state law to the facts of this case. In any

event, the petition should be denied since this Court does not sit to review questions of state law. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989). As has been noted, "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.10 (6th ed. 1986).

II. THE EIGHTH CIRCUIT CORRECTLY DECIDED ISSUES OF MISSOURI STATE LAW.

The Eighth Circuit decision in *Pree* affirmed the District Court judgment for respondent based on two independent applications of Missouri product liability law: (1) that respondent's unguarded propellers were not unreasonably dangerous as a matter of law, and (2) that the danger posed by rotating propellers was not beyond the expectation of the ordinary consumer. Pet. App. A at xv-xvi, xix; *Pree*, 983 F.2d at 867, 868. Petitioner contends that the "consumer expectation" test has been "rejected" by dicta of the Missouri Supreme Court (Pet. 10), and therefore criticizes the Eighth Circuit's reliance on the "consumer expectation" test to support its decision. While respondent disputes this contention, petitioner raises no argument against the alternative ground for decision by the Eighth Circuit. On this basis alone, the Petition should be denied.

The Eighth Circuit opinion begins by setting forth four elements a plaintiff must prove under Missouri law in order to recover under a theory of strict liability in tort

for a defective design. Because there was no dispute as to the other three elements, the Eighth Circuit "predicat[ed its] decision on the second element: whether the twin motors were in a defective condition unreasonably dangerous because they were designed without propeller guards." Pet. App. A at vii; *Pree*, 983 F.2d at 865. For two separate and distinct reasons, the Eighth Circuit concluded that petitioner failed to establish this essential element of his cause of action.

First, the Eighth Circuit reviewed, in the light most favorable to petitioner, all of the evidence presented at trial on the issue of whether the unguarded propellers were unreasonably dangerous when put to a reasonably anticipated use. Pet. App. A at vii-xvi; *Pree*, 983 F.2d at 866-67 (Part II of the opinion). Although petitioner argued that a safer alternative design could have been employed, the Eighth Circuit noted that "there was no evidence that such a design existed at the time the propellers were manufactured." Pet. App. A at xiv; *Pree*, 983 F.2d at 867. "[B]oth sides conceded that at this stage neither industry custom nor pertinent regulations dictate the use of propeller guards," and "that no boat manufacturer, or boating accessory manufacturer currently offers a propeller guard for planing pleasure boats for the purpose of protecting persons from propeller contact." *Id.* Moreover, "[e]xperts for both sides testified regarding the potential difficulties that propeller guards might engender." Pet. App. A at xv; *Pree*, 983 F.2d at 867. Applying this uncontroverted evidence to the standard announced in settled Missouri precedent, the Eighth Circuit concluded that "the evidence was insufficient to

show that [respondent's] engines were unreasonably dangerous, and the district court should have declared as a matter of law, that the engines were not defective and directed a verdict for [respondent]." Pet. App. A at xv-xvi; *Pree*, 983 F.2d at 867.

The Petition omits any reference to the first of the independent bases for affirming the judgment of the District Court. Instead, the Petition addresses only Part III of the Eighth Circuit's opinion, which affirms the judgment of the District Court based on the "consumer expectation" test. As explained by the Eighth Circuit, this test is distinct from the test employed in Part II of the Eighth Circuit's opinion, because "[t]he consumer expectation test focuses attention on the consumer rather than the manufacturer of the twin engines." Pet. App. A at xvii; *Pree*, 983 F.2d at 868. Reviewing the evidence presented at trial, and a decision of the Eleventh Circuit in a factually similar case, the Eighth Circuit concluded that "the evidence presented in the instant case not only supported the jury's verdict, but the evidence was sufficient for the trial court to hold, as a matter of law, that the unguarded propellers were not unreasonably dangerous beyond the expectation of the ordinary consumer, including [petitioner]." *Id.* at 868 (citing *Elliott*, 903 F.2d 1505).

Petitioner's quarrel with the Eighth Circuit's reliance on the "consumer expectation" test (Part III) does not in any way belie the alternative ground for the Eighth Circuit's decision (Part II): that respondent's unguarded propellers were not unreasonably dangerous as a matter of law. Accordingly, even if one concedes all of petitioner's contentions, the Petition should not be granted since the

Eighth Circuit decision is independently supported without regard to the question sought to be raised by the Petition, and as a result it is unlikely this Court would need to reach the point of alleged importance or conflict. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.4 at 201, § 6.37 at 391 (6th ed. 1986).

III. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS REGARDING THE BINDING FORCE OF CONSIDERED DICTA.

Petitioner does not contend that there is a direct conflict between the decision of the Eighth Circuit and a decision of the Missouri Supreme Court. The Petition rests entirely upon two premises: (1) that the Missouri Supreme Court has in dicta "rejected" the "consumer expectation" test as one means of determining whether a product is unreasonably dangerous; and (2) that the Eighth Circuit has refused to adhere to dicta by the Missouri Supreme Court in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986) (en banc), critical of that test. Both premises are false.

A. The Missouri state courts have not rejected the "consumer expectation test."

Petitioner's brief repeatedly cites *Nesselrode* for the proposition that Missouri courts have "rejected" the consumer expectation test. Pet. 10. However, as the Missouri Court of Appeals commented after summarizing a similar

reading of *Nesselrode*: "the sweeping scope of this statement demonstrates the fallaciousness of the plaintiff's position." *Richardson v. Holland*, 741 S.W.2d 751, 753 (Mo. Ct. App. 1987).[3]

The Missouri Supreme Court in *Nesselrode* did not reject the consumer expectation test, in dicta or otherwise. The majority opinion, joined by only three judges, merely stated that the court "ha[d] not yet formally incorporated" the test "in any meaningful way." 707 S.W.2d at 377. The opinion then cited, without criticism, four Missouri appellate court decisions and one decision of its own "which mention[ed]" the consumer expectation test, only questioning whether in those instances the test had been applied "in any substantive fashion." *Id.* at 377 n.10. Discussing a decision in which the Missouri Supreme Court itself had invoked the test, the court clarified that "we did not hold that under Missouri law the standard of defectiveness was rooted *only in* the expectations of the ordinary consumer." *Nesselrode*, 707 S.W.2d at 377-78 n.10 (emphasis added) (citing *Aronson's Men's Stores v. Potter*

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[3] Petitioner miscites *Richardson* as "recogniz[ing] [*Nesselrode*] as a determination by the Missouri Supreme Court *not* to adopt [the consumer expectation test]." Pet. 9. In fact, the language Petitioner quotes from *Richardson* is the court's summary of the appellant's argument, an argument which the court of appeals then rejected. If anything, the opinion in *Richardson*, written one year after *Nesselrode*, supports respondent's position that *Nesselrode* cannot be read as rejecting the consumer expectation test. The *Richardson* court noted: "It is not necessary to determine *if* Nesselrode rejects the two tests [i.e. the consumer expectation and risk utility tests] for use by the court in determining if the characteristics of a product provide a basis for a submissible case." 741 S.W.2d at 753 (emphasis added).

Electric Signal Co., Inc., 632 S.W.2d 472, 473-4 (Mo. 1982) (en banc)). Notably, the Missouri Supreme Court refrained from criticizing, much less foreclosing, the use of either the consumer expectation test or the risk-utility test in the future. Finally, having raised the issue *sua sponte*, the Missouri Supreme Court in *Nesselrode* "cho[]se *not to decide* th[e] question" of which standards courts should or may use to determine when a product is defectively designed. *Id.* at 378 (emphasis added).

In short, the majority opinion in *Nesselrode* left the viability of the consumer expectation test – and for that matter any other test – completely unresolved. Indeed, this failure either to adopt or reject any of the available means of limiting or defining the concept of "unreasonably dangerous" was one of the "glaring deficiencies in the principal opinion" which prompted the vociferous dissent:

> [B]y not approving one of the tests, the principal opinion, in effect, leaves all future triers of strict product liability cases at their peril as to choosing a theory of proof at trial.

707 S.W.2d at 393 (Welliver, J., dissenting). Subsequent case law has borne out this prediction, and the lower courts in Missouri continue to grapple with the question of which of the available standards to apply. Nonetheless, the consumer expectation test has by no means been excluded from the menu of options: on at least two occasions since *Nesselrode*, the Missouri Court of Appeals has invoked the test with apparent approval, *see Lucas by Lucas v. R.G. McKelvey Building Co.*, 1992 WL 219182 (Mo. Ct. App. 1992); *Bhagvandoss v. Beiersdorf, Inc.*, 1986 WL 141628 (Mo. Ct. App. 1986), and in neither of these cases

did the Missouri Supreme Court feel compelled to overrule its application. *See Lucas by Lucas v. R.G. McKelvey Building Co.*, 847 S.W.2d 806 (Mo. 1993);[4] *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. 1987).

Under these circumstances, where at least seven Missouri cases have applied the consumer expectation test and none has explicitly foreclosed its use, the Eighth Circuit in *Pree* was entirely accurate in stating that Missouri courts "ha[ve] not rejected" the test. Pet. App. A at xvi; *Pree*, 983 F.2d at 867. More to the point, the Eighth Circuit did not err, much less intentionally ignore state court dicta, in invoking the consumer expectation test in this instance.[5]

B. The Eighth Circuit adheres to unambiguous state court dicta.

Petitioner asserts that "[h]ad this matter arisen in the Fifth, Sixth, Seventh, Tenth, or Eleventh Circuits, it is clear that the result would have been different." Pet. 13.

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[4] It should be noted that the Missouri Supreme Court's recent decision in *Lucas* postdates the Eighth Circuit's decisions in *Cowens v. Siemans-Elema AB*, 837 F.2d 817 (8th Cir. 1988), *Linegar v. Armour of America, Inc.*, 909 F.2d 1150 (8th Cir. 1990), and *Pree*. The state supreme court's silence in the face of the Eighth Circuit's continued application of the consumer expectation test would seem to contradict Petitioner's assertion that the state's high court had long since "rejected" the test in *Nesselrode*.

[5] Moreover, the Petition should be denied because this Court rarely reviews such state-law questions; "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

While the basis of this facile assertion is anything but clear, its premise – that these circuits feel themselves bound by state court dicta and that the Eighth Circuit does not – is clearly wrong.

Petitioner cites no Eighth Circuit opinion in which the court of appeals refused to follow unambiguous state court dicta. Indeed, the Eighth Circuit has long recognized that considered state court dicta are an invaluable indication "of what the state courts would probably hold." *Mutual Benefit Health & Accident Ass'n. v. Cohen*, 194 F.2d 232, 241 (8th Cir. 1952). *See also Standard Accident Ins. Co. v. Roberts*, 132 F.2d 794, 799 (8th Cir. 1942) (stating that clear, unequivocal dictum in an opinion of the state's highest court is persuasive as to what the state court would decide); *Goodson v. United States*, 151 F. Supp. 416 (D. Minn. 1957), *aff'd*, 253 F.2d 900 (8th Cir. 1958) (considered dicta are "entitled to great weight"). Accordingly, the Eighth Circuit has stated explicitly that considered dicta "should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law." *Brink's, Inc. v. Hoyt*, 179 F.2d 355, 358 (8th Cir. 1950).

Contrary to Petitioner's characterizations, the Eighth Circuit's opinions in *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1152 (8th Cir. 1990), *Cowens v. Siemans-Elema AB*, 837 F.2d 817 (8th Cir. 1988), and this case do not depart from this tradition of respect towards considered state court dicta. The Eighth Circuit in *Cowens* recognized "the Missouri Supreme Court's expression in *Nesselrode* of its dissatisfaction" with the consumer expectation test, but correctly observed that the state supreme court had thereafter refrained – either in dicta or otherwise – from

explicitly rejecting the concept or expressly overruling prior Missouri cases which had invoked this concept. *Cowens*, 837 F.2d at 822.

Nor did the Eight Circuit in *Pree* make any statement indicating a refusal to follow unambiguous state court dicta. As it had done in *Cowens*, the Eighth Circuit noted the Missouri Supreme Court's cautionary words in *Nesselrode* (albeit citing them indirectly through *Cowens*), but correctly interpreted those words as leaving open the question of which test to apply when proving a product defect under Missouri law. Finding little guidance in *Nesselrode*, the Eighth Circuit in *Cowens*, *Linegar* and *Pree* ruled in accordance with prior decisions of the Missouri Court of Appeals and applied the consumer expectation test as *one* of the measures of defectiveness. *See Crytz v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo. Ct. App. 1978); *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981); *Aronson's*, 632 S.W.2d at 473-474. Thus, the ruling in this case does not derogate the value accorded by the Eighth Circuit – a value equal to that assigned by the other circuits – to unambiguous state court dicta. *See Standard Accident Insurance Co.*, 132 F.2d at 799 ("decisions of intermediate state courts are to be followed by federal courts as to state law 'unless [the federal court] is convinced by other persuasive data that the highest court of the state would decide otherwise.'") The "conflict" among the circuits with respect to the treatment of state court dicta is entirely fictitious.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

June 1993

Respectfully submitted,

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